Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Case No.:

In The

# Supreme Court of the United States

October Term, 1998

MICHAEL A. SCOTT

*Petitioner,*

*versus*

NORFOLK SOUTHERN CORPORATION, *et al.*,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## PETITIONER'S APPENDIX

MICHAEL A. SCOTT
4753 Longmont Road
Virginia Beach, Virginia
23456-5017
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*Petitioner Appearing Pro Se*

48PP

APPENDIX A
UNPUBLISHED OPINION OF THE
UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

UNPUBLISHED

# UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

MICHAEL A. SCOTT,

*Plaintiff-Appellant,*

v.

NORFOLK SOUTHERN CORPORATION; D. R. GOODE, individually and in his official capacity with Norfolk Southern Corporation; S. C. TOBIAS, individually and in his official capacity with Norfolk Southern Corporation; J. L. MANETTA, individually and in his official capacity with Norfolk Southern Corporation; D. W. MAYBERRY, individually and in his official capacity with Norfolk Southern Corporation; W. E. HONEYCUTT, individually and in his official capacity with Norfolk Southern Corporation; L. D. HALE, individually and in his official capacity with Norfolk Southern Corporation; T. A. HEILIG, individually and in his official capacity with Norfolk Southern Corporation; C. D. VITTUR, individually and in his official capacity with Norfolk Southern Corporation; D. D. GRAAB, individually and in his official capacity with Norfolk Southern Corporation; A. L. LUTTRELL, individually and in his official capacity with Norfolk Southern Corporation; J. R. GRAY, individually and in his official capacity with Norfolk Southern Corporation; W. F. HENLEY, individually and in his official capacity with Norfolk Southern Corporation; J. E. PAIR,

No. 97-1490

individually and in his official capacity with Norfolk Southern Corporation; J. W. CLEMMER, individually and in his official capacity with Norfolk Southern Corporation,
*Defendants-Appellees.*

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Henry C. Morgan, Jr., District Judge.
(CA-96-257-2)

Submitted: June 2, 1998

Decided: June 24, 1998

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

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Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

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**COUNSEL**

Michael A. Scott, Appellant Pro Se. James Stanton Whitehead, SIDLEY & AUSTIN, Chicago, Illinois; Samuel Johnson Webster, Heather Ann Mullen, David Nash Payne, WILLIAMS, KELLY & GREER, Norfolk, Virginia, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

## OPINION

PER CURIAM:

Michael A. Scott appeals from several district court orders dismissing a variety of claims involved in Scott's employment discrimination action. We affirm in part, vacate in part, and remand.

Scott was employed by the Defendant, Norfolk Southern Corporation ("Norfolk Southern") from August 1985 to February 1996. In 1995, Scott filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") alleging same-gender sexual harassment and a sexually hostile environment. Following his termination, Scott filed another discrimination complaint with the EEOC alleging racial discrimination and retaliation for the filing of his 1995 EEOC complaint.

Following the 1996 EEOC charge, Scott filed this complaint against Norfolk Southern and fourteen individual executives, managers and supervisors of Norfolk Southern, setting out twenty-four counts based on Title VII and the on-the-job injury. Scott amended his complaint three times, and the district court entered an order accepting Scott's third amended complaint, which set forth thirty-two counts, as the operative complaint.* Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).On August

*On May 3, 1996, Scott filed a motion to amend his complaint for the fourth time. The district court denied the motion on June 7, 1996.

14, 1996, the district court entered an order dismissing all claims against the individual Defendants, dismissing counts 2-21, 23, 24, 31 and 32 against Norfolk Southern, and granting Scott leave to amend counts 1, 22, 25, 26, 27, 28, 29, and 30 against Norfolk Southern. Pursuant to the court's August 14 order, Scott again amended his complaint against Norfolk Southern setting forth the eight counts.

On February 5, 1997, the district court granted summary judgment to Norfolk Southern on counts 5, 6, 7, and 8, and denied Norfolk Southern's motion to dismiss on count 4—leaving counts 1, 2, 3, and 4. On April 1, 1997, the court entered an order dismissing part of Scott's count one. A jury trial commenced on February 18, 1996, and final judgment was entered April 4, 1996. The jury verdict dismissed counts 1, 2, and 4, and found in favor of Scott on count 3. Scott was awarded $4998 with interest at the rate of 6%. Scott timely appealed.

On appeal, Scott raises several issues concerning each of the district court's orders. The first issue raised is that the district court erred in its April 1, 1997 order by dismissing his Title VII claim of retaliation. Scott alleged that he was transferred in February 1996 as a result of his 1995 EEOC charge, in which he asserted same-gender sexual harassment and a sexually hostile environment. In dismissing Scott's Title VII retaliation claim, the district court relied on *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), and *Mayo v. Kiwest Corp.*, No. 95-2638, 1996 WL 460769 (4th Cir. August 15, 1996) (unpublished). In *McWilliams*, this Court held that same gender sexual harassment was not actionable under Title VII absent an allegation that either the victim or the harassers were homosexual or bisexual. *See McWillaims*, 72 F.3d 1195.

In *Mayo*, this Court held that "Title VII prohibits an employer from discriminating against an employee in retaliation for that employee's . . . complaint about [ ] and employment practice made unlawful under Title VII." *Mayo*, 1996 WL 460769 at **4. The Court stated that the employee needed to have an "objectively reasonable belief that he was the victim of discrimination made unlawful under Title VII." *Id.* Looking at the state of the law at the time of Mayo's complaint, this Court found that "no court had held a hostile-environment claim actionable where both the alleged harasser and the alleged victim were of the same sex, no claim was made that either the alleged harasser or the alleged victim was homosexual or bisexual, and no claim was made that the alleged harasser treated men in the workplace differently than women." *Id.* at **5. Given the state of the case law, the Court determined that Mayo was not reasonable in believing that his claim was actionable under Title VII and thus, there was no protected activity on which to base a retaliation claim. *Id.*

However, the Supreme Court has recently issued its decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998), in which the Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII and that it is not necessary that the harasser be shown to be homosexual or bisexual. *See Oncale*, 118 S. Ct. at 1002. The Court stated that "harassing conduct need not be motivated by sexual desire to support the inference of discrimination on the basis of sex." Because *Oncale* overrules previous precedent in this Circuit, we vacate that portion of the district court's April 1, 1997 order dismissing Scott's Title VII retaliation claim and remand for further proceedings in light of *Oncale*. We affirm the remainder of the district court's April 1 order.

As for Scott's remaining claims on appeal, we have reviewed the district court's orders and find no reversible error. Accordingly, we affirm the remainder of the district court's orders to the extent that Scott has appealed them. We dispense with oral arguments because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*AFFIRMED IN PART, VACATED IN PART, AND REMANDED*

**APPENDIX B**
**ORDER OF THE**
**UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT**
**DENYING PETITIONER'S REQUEST FOR REHEARING**

**UNITED STATES COURT OF APPEALS**
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517

August 10, 1998

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Re: 97-1490 Scott v. Norfolk Southern Cor
CA-96-257-2

Dear Counsel:

Enclosed is a copy of an order filed today in this case.

Yours truly,

PATRICIA S. CONNOR
Clerk

/s/ Donna Brown
By: _____
Deputy Clerk

Enclosure(s)

cc: Norman H. Meyer Jr.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 10, 1998

No. 97-1490
CA-96-257-2

MICHAEL A. SCOTT

Plaintiff - Appellant

v.

NORFOLK SOUTHERN CORPORATION; D. R. GOODE, individually and in his official capacity with Norfolk Southern Corporation; S. C. TOBIAS, individually and in his official capacity with Norfolk Southern Corporation; J. L. MANETTA, individually and in his official capacity with Norfolk Southern Corporation; D. W. MAYBERRY, individually and in his official capacity with Norfolk Southern Corporation; W. E. HONEYCUTT, individually and in his official capacity with Norfolk Southern Corporation; L. D. HALE, individually and in his official capacity with Norfolk Southern Corporation; T. A. HEILIG, individually and in his official capacity with Norfolk Southern Corporation; C. D. VITTUR, individually and in his official capacity with Norfolk Southern Corporation; D. D. GRAAB, individually and in his official capacity with Norfolk Southern Corporation; A. L. LUTTRELL, individually and in his official capacity with Norfolk Southern Corporation; J. R. GRAY, individually and in his official capacity with Norfolk Southern Corporation; W. F. HENLEY, individually and in his official capacity with Norfolk Southern Corporation; J. E. PAIR, individually and in his official capacity with Norfolk Southern Corporation; J. W. CLEMMER, individually and in his official capacity with Norfolk Southern Corporation,

Defendants - Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Connor

_____

CLERK

# APPENDIX C
# OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT DISMISSING PETITIONER'S SECTION 1981 CLAIM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED AUGUST 14, 1996
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

MICHAEL A. SCOTT,

Plaintiff,

v. Action No. 2:96cv257

NORFOLK SOUTHERN CORPORATION,
D. R. GOODE, et al.

Defendants.

OPINION AND ORDER

Pending before the court is Defendants' Motion to Dismiss, filed on May 17, 1996. Also pending in this case are Defendants' Motion for Injunction, filed on July 10, 1996 and Scott's Motion for an Extension of Time to respond to Defendants' Motion for an Injunction, filed on July 16, 1996. Defendants seek to enjoin Scott from filing anything further with the Court until all outstanding motions have been ruled upon.

## I. FACTUAL AND PROCEDURAL HISTORY.

On May 2, 1996, plaintiff Michael A. Scott, filed a 32 count complaint against his former employer Norfolk Southern Corporation ("Norfolk Southern") and 14 individual executives, managers and supervisors of Norfolk Southern. Scott's voluminous claims all arise from allegations: (1) that Defendants have retaliated against him as a result of his filing charges of male-on-

male sexual harassment with the Equal Employment Opportunity Commission ("EEOC") and a subsequent Title VII lawsuit based upon that EEOC Charge in this Court; and (2) that he suffered an on-the-job personal injury for which he is entitled to damages under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq.

## II. Defendants' Motion To Dismiss.

### a. STANDARD OF REVIEW

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept the facts pleaded by the plaintiff as true. The claim should not be dismissed unless it appears to a certainty that the plaintiff can prove no facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Bruce v. Riddle, 631 F.2d 272, 273-74 (4th Cir. 1980). The court must accept the factual allegations in the complaint and must construe them in the light most favorable to the plaintiff. Martin Marietta Corp. v. International Telecommunications Satellite Org., 991 F.2d 94, 97 (4th Cir. 1992). The court can only rely upon the allegations in the complaint and those documents attached as exhibits or incorporated by reference. Simons v. Montgomery County Police Officers, 762 F.2d 30, 31 (4th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). The Court shall consider each of the plaintiffs 32 Counts in turn and reference previous sections when appropriate.

### B. Count 1

Count 1 is a claim under Title VII of the 1964 Civil Rights Act. Scott alleges that the Defendants discriminated against him on account of his race.

Scott cannot bring a Title VII suit against persons who were not named in his underling EEOC charge. Dickey v. Greene, 710

F.2d 1003, 1005 (4th Cir. 1983). None of the Defendants in the present suit except Norfolk Southern were named in Scott's EEOC charge. (Complaint, Ex. F.) Scott claims he properly referred to all of the Defendants in an EEOC charge he filed on March 6, 1996 alleging race and retaliatory discrimination but this did not put these Defendants on notice that they were being named in an EEOC charge. Therefore, Count 1 is **DISMISSED** against all of the Defendants except Norfolk Southern.

As to Scott's claims against Norfolk Southern, Defendants contend that Scott's allegations relate to events which occurred before the 300 day deadline preceding the EEOC filing, and are thus barred under 42 U.S.C. § 2000e-5(e). Scott's makes several allegations in the EEOC charge and in his complaint that are not dated so the Court cannot determine in what time period these events happened. Additionally, Scott complains of actions that are unrelated to racial discrimination or retaliatory discrimination resulting from his EEOC charge. Such broad allegations beyond the scope of Title VII are inappropriate. 42 U.S.C. § 2000e-2; 42 U.S.C. § 2000e-3.

For the above stated reasons the Count 1 is **DISMISSED** as to all individual Defendants. However, plaintiff is **GRANTED** leave to amend Count 1 to state clearly and briefly his allegations against Defendant Norfolk Southern.

**C. Counts 2, 3, and 4.**

Count 2 is a claim under §§ 1981 and 1983 of the Civil Rights Act of 1866, Count 3 is a claim under §§ 1981(b) and 1983 of the Civil Rights Act of 1866, and Count 4 is a claim under §§ 1983 and 1988 of the Civil Rights Act of 1866

To state a claim under 42 U.S.C. § 1983 plaintiff must claim that the defendant acted "under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District

of Columbia. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988). Scott claims that Norfolk Southern's "railroad police agents" acted under color of state law. Scott's sole allegation involving these police agents is that they assaulted him. (Complaint at ¶ 220-227.) These allegations of assault do not have anything to do with Scott's cause of action asserted in Counts 2, 3, and 4, nor is it clear who these agents work for or what railroad police agents are.

Furthermore, the statute of Limitation under 42 U.S.C. § 1981 is two (2) years. Patterson v. American Tobacco Company, 535 F.2d 257 (4th Cir. 1976). Scott's EEOC charge and subsequent Title VII lawsuit alleged male-on-male sexual harassment. Scott has not alleged that he was the victim of racial discrimination within the two year Statute of Limitation.

For the above stated reasons, Counts 2, 3, and 4 are **DISMISSED.**

**D. Count 5.**

Count 5 is a claim under the Commonwealth of Virginia's Discrimination Statute. The Court presumes that when Scott refers the Virginia Discrimination Statute he is referring to the Virginia Human Rights Act, Va. Code § 2.1-714 (Michie 1995). This act only creates a private cause of action if the employer employs between five (5) and fifteen (15) employees. Va. Code § 2.1-725. Norfolk Southern employs far more than fifteen (15) employees.

Therefore, Count 5 is **DISMISSED.**

**E. COUNTS 6, 7, 8, and 9.**

Counts 6, 7, 8, and 9 allege violations of Article 4, and the First, Fifth and Fourteenth Amendments to the United States Constitution. Scott must invoke 42 U.S.C. § 1983 to enforce these provisions of the Constitution. As with Counts 2, 3, and 4 above,

Scott has failed to claim that Defendants acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" as is required to state a 42 U.S.C. § 1983 claim. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988).

For this reason Counts 6, 7, 8 and 9 are **DISMISSED.**

**F. Counts 10, 11, 12, 13, 14, and 15.**

Count 10 is a claim under the Civil Rights Act of 1866 and 42 U.S.C. § 1985(2), Count 11 is a claim under the Civil Rights Act and 42 U.S.C. § 1985(3), Count 12 is a claim under the Civil Rights Act of 1866 and 42 U.S.C. § 1986, Count 13 is a claim under the Commonwealth of Virginia Conspiracy Act, Count 14 is a claim under the Federal Conspiracy Act of 1861.

The Federal Ku Klux Klan Act of 1871, and the Federal Conspiracy Act of 1861 have been codified at 42 U.S.C. §§ 1985, 1986. Under 42 U.S.C. § 1985 Scott must allege that:

> Two or more persons . . . conspire[d] to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matters pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . .

42 U.S.C. § 1985. Under 42 U.S.C. § 1986 Scott must allege that the Defendants:

> Who. having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 U.S.C. § 1985], are about to be committed, and having

> the same, neglects and refuses to do so, if such wrongful acts be committed, shall be liable to the party injured."

42 U.S.C. § 1986.

Scott has not stated a claim under these statutes because he has not properly pleaded a conspiracy. Scott has only made conclusory allegations that Defendants harassed Scott and intimidated Scott's friends so they would not testify at his previous trials. Scott has not alleged any agreement or other acts committed in furtherance of the conspiracy so these conspiracy claims are deficient. Buschi v. Kirven, 775 F.2d 1240, 1248 (4th Cir. 1985). Thus Claims 10, 11, 12, 14, and 15 are **DISMISSED.**

As for Count 13, the Court assume that Scott is referring to Virginia Code § 18.2-499, -500 (Michie 1996), when he invokes the Virginia Conspiracy Act. This Act applies only to harm done to businesses. Because Scott has not alleged such a harm, Count 13 is **Dismissed.**

**G. Count 16.**

Count 16 is a claim for negligent supervision under the Federal Employer's Liability Act ("FELA"), the Federal Railroad Safety Act ("FRSA") and Virginia common law.

Scott alleges that certain individual Defendants were guilty of negligent supervision in connection with Norfolk Southern, violations of Title VII. Only common carriers are liable under FELA. 45 U.S.C. § 51. "Common carriers" has been defined as one who operates railroads. Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920). Therefore, Plaintiff's negligent supervision claims under FELA are **DISMISSED.**

There is no private cause of action under the FRSA. 49 U.S.C. § 20109; Abate v. Southern Pacific Transp. Co., 928 F.2d 167, 160-

70 (5th Cir. 1991). For this reason the FRSA claims against all of the Defendants are **DISMISSED.**

Additionally, Virginia does not recognize a cause of action for negligent supervision of employees. Chesapeake and Potomac Tel. Co. v. Dowdy, 235 Va. 55 (1988). Therefore, Count 16 is **DISMISSED.**

**H. Count 17 and 18.**

Count 17 is a claim for defamation, libel and slander under 42 U.S.C. § 1983, and Count 18 is a conspiracy claim for defamation, libel, and slander under 42 U.S.C. § 1985(3).

Scott must allege the following for a claim of defamation, libel, and slander: "[F]irst, that the publication is both false and derogatory in nature and , second, that a third party would believe such to be true of the plaintiff, thus injuring plaintiff's reputation within the community." Falwell v. Penthouse Intern., Ltd., 521 F. Supp. 1204, 1208 (W.D. Va. 1981). Scott has failed to allege that there was any publication. Scott claims that his letter of dismissal and other written statements were issued by Defendants, but Scott does not state to whom they were issued.

As previously discussed in connection with counts 10, 11, 12, 13, 14 and 15, Scott has failed t properly plead a conspiracy. Because Scott has failed to properly plead conspiracy and publication, Counts 17 and 18 are **DISMISSED.**

**I. Counts 19 and 20.**

Count 19 is a claim for Constitutional invasion of privacy under 42 U.S.C. § 1983, and Count 20 is a claim for invasion of privacy conspiracy under 42 U.S.C. § 1983.

As with Count 2, 3, 4, 7, 8, and 9 above Scott has failed to plead facts showing that Defendants acted "under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" as required under 42 U.S.C. § 1983. West v Atkins, 487 U.S. 42, 48 (1988).

Counts 19 and 20 are **DISMISSED.**

J. **Count 21.**

Count 21 is a claim for breach of contract.

This claim is nothing more than a restatement of Scott's other claims in this case. Scott alleges that several federal laws were implied provisions of his oral contract, and that when Norfolk Southern violated these law, they breached Scott's contract. Contracts that cannot be performed within one (1) year must be in writing under the Statute of Frauds. Therefore, Count 21 is **DISMISSED.**

K. **Counts 22.**

Count 22 is a claim of liability for personal injuries under the FELA. Only common carriers are liable under the FELA. 45 U.S.C. § 51. "Common carriers" has been defined as one who operates railroads. Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920). The FELA claim against the individual Defendants is **DISMISSED.**

As to Norfolk Southern, their Motion to Dismiss Count 22 is **DENIED.** Additionally, the Court **GRANTS** plaintiff leave to amend Count 22 so as to clearly and briefly state the cause, extent and date of his injuries..

L. **Counts 23 and 24.**

Count 23 is a claim of liability for personal injury under FRSA.

As stated above, there is no private cause of action under the FRSA. 49 U.S.C. § 20109; Abate v. Southern Pacific Transp. Co., 928 F.2d 167, 169-70 (5th Cir. 1991). Furthermore, the FELA claim is identical to Count 22. Therefore, Count 24 is **DISMISSED.**

**N. Counts 25, 26, 27, and 28.**

Count 25 is a claim of intentional infliction of emotional distress under the FELA and the FRSA, Count 26 is a claim of intentional infliction of emotional distress, Count 27 is a claim of negligent infliction of emotional distress under the FELA and the FRSA, and Count 28 is a claim of negligent infliction of emotional distress.

Claims under FRSA in Counts 25 and 27 are **DISMISSED** because FRSA does not give rise to a private cause of action. See discussion infra section II-G and II-K. Claims 25 and 27 under the FELA against the individual defendants are **DISMISSED** because the FELA does not apply to individual Defendants. See discussion infra section II-G and II-K.

However, Scott is **GRANTED** leave to amend his FELA and common law claims for negligent and intentional infliction of emotional distress against Norfolk Southern. Plaintiff must clearly and briefly state the specific conduct of Norfolk Southern that give rise to these claims, and when such conduct occurred.

**O. Count 29.**

Count 29 is a claim of wrongful termination and wrongful discharge. Scott claims that he was terminated for filing suit against Norfolk Southern. The Commonwealth of Virginia does recognize causes of action for wrongful discharge in violation of pubic policies expressed in state statutes. Miller v. SEVAMP, 234 Va. 462, 468, 362 S.E.2d 915, 919 (1987); but see Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500 (E.D. Va. 1992) (no generalized cause of action for retaliatory discharge).

Defendants' Motion to Dismiss Count 29 is **DENIED** and plaintiff is **GRANTED** leave to amend Count 29. However, the Court will not necessarily exercise supplemental jurisdiction over this claim.

**P. Count 30.**

Count 30 is a claim of assault and battery.

Scott claims that on February 15, 1996, he observed unidentified railroad police agents and private investigators watching his home. Scott alleges that these men assaulted him. Scott further claims that these men were acting under the direction of Norfolk Southern.

For an employer to be held liable under the theory of respondeat superior the employee must have been performing his employer's business and acting within the scope of his employment. Kensington Associates v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901, (1987) (citing McNeil v. Spindler, 191 Va. 685, 694, 62 S.E.2d 13, 17 (1950)). "When an employer-employee relationship has been established, 'the burden is on the [employer] to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of.'" Kensington Associates, 234 Va. at 432-33 (citations omitted) (quotes, brackets, and italics in original).

Defendants point out the Plaintiff has admitted that these employees were "acting out of personal motive beyond the scope of their Norfolk Southern employment with the assault and battery of Scott." (Pl's Mot. in Opp'n Mot. dismiss. at 22.) However, because Plaintiff is preceding pro se, this admission will be overlooked. Defendants' Motion to Dismiss Count 30 is **DENIED** and the Courts **GRANTS** the Plaintiff leave to amend Count 30.

**O. Counts 31 and 32.**

Count 31 is a claim under the Employment Retirement Income Security Act ("ERISA"), and Count 32 is a claim of breach of fiduciary duty.

ERISA prohibits an employer from terminating an employee for the purpose of interfering with the employee's ERISA rights. 29 U.S.C. § 410. In Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231 (4th Cir. 1991), the Fourth Circuit Court of Appeals held that "one must prove a specific intent of the employer to interfere with an employee's pension rights" to sue for wrongful termination under ERISA. Scott has not specifically pled this element and it cannot be inferred from Norfolk Southern's actions. Therefore, Count 31 is **DISMISSED.**

Scott claims that he has been denied benefits and this denial is actionable under 29 U.S.C. 1132(a)(1)(B). "An ERISA claimant generally is required to exhaust the administrative remedies provided in his or her employee benefit plan before commencing an ERISA action in Federal Court." Hickey v. Digital Equipment Corp., 43 F.3d 941 (4th Cir. 1995) (citation omitted). Because Scott has not exhausted his administrative remedies, Count 32 is **DISMISSED.**

**III. Defendant's Motion for Injunction.**

Defendants have moved to enjoin Plaintiff from filing any further pleadings, motions, discovery or briefs with this Court until all outstanding motions have been ruled upon. While the Court is concerned that the Plaintiff's prodigious motions and pleadings have gone well beyond any reasonable bounds, the Court **FINDS** that it cannot enjoin Plaintiff from submitting additional motions or pleadings to the Court. However, the Court **ORDERS** that Defendants are not required to respond to any subsequent filings by the plaintiff until so ordered by the Court.

## III. CONCLUSION.

For the above stated reasons, all claims against individual defendants are **DISMISSED.** The Court **GRANTS** Plaintiff leave to amend his claims against Norfolk Southern as to Counts 1, 22, 26, 28, 29, 30 and the FELA claims of count 25 and 27. All other claims are **DISMISSED.** Plaintiff's amended Complaint may be filed no later than August 19, 1996. Norfolk Southern response may be filed no later than September 3, 1996.

The Court **REQUESTS** the Clerk mail a copy of this Order to Plaintiff and counsel for Defendants.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 14, 1996

APPENDIX D

OPINION AND ORDER OF THE

UNITED STATES DISTRICT COURT

DENYING PETITIONER TO CLAIM THAT THE TRANSFER

HARASSMENT AND DISCHARGE WERE ACTS OF TITLE

RETALIATION AND DONE BECAUSE OF HIS BLACK RACE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED FEBRUARY 5, 1997
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

MICHAEL A. SCOTT,

Plaintiff,

v. Action No. 2:96cv257

NORFOLK SOUTHERN CORPORATION,

Defendant.

OPINION AND ORDER

Plaintiff, Michael A. Scott ("Scott"), filed suit against his former employer, Norfolk Southern Corporation ("NS"), alleging thirty-two counts arising from his employment with NS. On August 5, 1996, the Court dismissed twenty-four (24) of the thirty-two (32) counts alleged in Scott's Third Amended Complaint. The Court granted Scott leave to amend his remaining claims so that each states a cause of action. On August 16, 1996, Scott timely filed his Fifth Amended Complaint.[1] On September 3, 1996, NS filed an answer to Scott's Fifth Amended Complaint. On December 16, 1996, NS filed Motions to Dismiss and for Summary Judgment, as well as affidavits, exhibits, and a notice of motions to pro se plaintiff. Scott filed a brief in opposition, exhibits, and an affidavit on January 3, 1997, and NS filed a reply brief on January 8, 1997.

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[1] Scott's Fourth Amended Complaint was attached to his Fourth Motion to Amend, which the Court denied on June 6, 1996.

Scott's Fifth Amended Complaint consists of the following eight counts: Count One (1), Title VII racial discrimination and retaliation for Scott's previous Equal Employment Opportunity Commission ("EEOC") charge and lawsuits against NS and its agents; Count Two (2), personal injury under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq.; Count Three (3), common law assault and battery; Count Four (4), Virginia common law wrongful discharge; Count Five (5), intentional infliction of emotional distress under FELA; Count Six (6), negligent infliction of emotional distress under FELA; Count Seven (7), Virginia common law intentional infliction of emotional distress; and Count Eight (8), Virginia common law negligent infliction of emotional distress. In addition to the briefs, affidavits, and exhibits submitted by the parties, the Court also heard oral arguments and testimony from Scott at the January 28, 1997, hearing on defendant's motions.

Scott was hired by NS as a Management Trainee on August 16, 1985. Scott was a Mechanical Foreman at NS Lambert Point Coal Piers from March, 1993, through February 16, 1996, the date of his discharge. During the term of Scott's employment with NS, he was twice promoted and transferred on four occasions, twice requiring a change of residence. Scott filed a lawsuit against NS alleging male-on-male sexual harassment, and in December 1995, a jury returned a verdict in his favor. On January 5, 1996, one month after the jury verdict, NS offered Scott $70,000 in exchange for his resignation and release of any additional legal claims against NS. Scott declined NS's offer.

While employed at the Coal Piers, Scott, an African-American male, alleges that he was harassed and threatened because of his race. He also alleges that he had a slip-and-fall accident resulting in injuries to his back and shoulders on February 8, 1996. On February 16, 1996, NS terminated Scott for allegedly filing an untimely and potentially false injury report.

The facts forming the basis of each of Scott's claims will be discussed in greater detail as the Court addresses the defendant's motions regarding those claims.

## I. Standard for Summary Judgment

Summary judgment under Rule 56 is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 610 (4th Cir. 1985). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. Celotex Corp., 477 U.S. at 322-24. Such facts must be presented in the form of exhibits and sworn affidavits. Failure by plaintiff to rebut defendants' motion with such evidence on his behalf will result in summary judgment when appropriate. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

## II. Analysis.

### Count One (1) Title VII Claims.

Scott alleges that because of his race, he was (1) not equally compensated, (2) not promoted, (3) harassed, and (4) discharged. He also claims that NS proposed to transfer him to Decatur, Illinois in retaliation for Scott's EEOC charges and related lawsuits. The Court will address each claim in turn.

a. Equal Compensation and Promotion.

Defendant seeks summary judgment as to Scott's Title VII equal compensation and promotion claims because (1) Scott has not exhausted his administrative remedies, and (2) these claims are untimely.

Claims in a Title VII lawsuit must have been included in an EEOC charge or be reasonably related to the allegations set forth in an EEOC charge. Nicol v. Imagematrix, Inc., 767 F. Supp. 744, 753 (E.D. Va. 1991). "[T]he critical question is whether the claims set forth in the civil complaint come within the scope of the EEOC investigation which can reasonably be expected to grow out of the [EEOC] charge of discrimination?" Powers v. Grinnell Corp., 915 F.2d 34, 38-39 (1st Cir. 1990); see also Nicol, 767 F. Supp. at 753.

In Scott's EEOC charge filed March 6, 1996, he alleges that NS retaliated against him as a result of his January 1995, EEOC charge and subsequent lawsuit. Scott further alleged that he was harassed, transferred, and discharged as a result of his race. Additionally, Scott makes general allegation that all minorities have been excluded from certain position at NS. However, no where in his EEOC charge does Scott allege that he was past over for promotions or unfairly compensated because of his race. Accordingly, the Court **FINDS** that the allegation contained in Scott's EEOC charge would not reasonably lead to an investigation of the compensation and promotion claims alleged in Scott's Fifth Amended Complaint.

Moreover, even if Scott had alleged discriminatory compensation and promotion claims in his EEOC charge, these claims would be barred as untimely. Under Title VII, a charge of discrimination must be filed with the EEOC within 300 days after the alleged unlawful practice. 42 U.S.C. § 20003-5 (1996). The filing requirement is "akin to a statute of limitations period and failure to meet the deadline renders the discriminatory occurrence without

legal consequences." Williams v. Enterprise Leasing Co. of Norfolk/Richmond, 911 F. Supp. 988 (E.D. Va. 1995)(citations omitted). The equal compensation and promotion allegations in Scott's complaint occurred long before the 300 day limitation period.

Nevertheless, Scott seeks to salvage these stale claims by arguing that the discriminatory acts continued to a point within the 300 day period prior to the filing of his EEOC charge. This court has recognized a continuing violation doctrine where at least one of the alleged violations has occurred within the applicable time period. Id. at 995. This Court has adopted a three factor test to determine the applicability of the continuing violation doctrine: "(1) whether the alleged acts involve the same type of discrimination; (2) whether the alleged acts are frequent; and (3) whether the alleged acts have a degree of performance which would trigger an employee's awareness and duty to assert his or her rights." Id. at 996. (citations omitted). The third and most important factor precludes use of the doctrine where the stale acts were so adverse and visible as to "put a reasonable employee on notice of the alleged discriminatory animus." Id. Where the Plaintiff claims stale acts as part of a "continuing violation plaintiff must at the very least show that he or she failed to perceive the alleged discriminatory animus causing the claimed injury prior to the statutory period, and that such recognition would not reasonably have occurred until a point in time within the statutory period." Id.

In the case at hand, Scott admits that he knew of these claims early on and felt that NS's actions were racially motivated when they first occurred. (Scott Dep. at 48-54, 66-81, 116-130.) Accordingly, the Court **GRANTS** NS's summary judgment motion and **DISMISSES** Scott's equal compensation and promotion claims.

**b. Racial Harassment and Discharge.**

In order to establish a prima facie case of a racially hostile working environment, the allegations must be so severe or

pervasive as to alter the conditions of employment. Meritor Sav. Bank F.S.B. v. Vinson, 477 U.S. 57, 66 (1986). "The existence of a hostile work environment cannot be predicated upon acts that are isolated or genuinely trivial." Carter v. Ball, 33 F.3d 450, 461 (4th Cir. 1994). In order to hold NS liable for the acts of its employees, Scott must also demonstrate that NS had actual or constructive knowledge of the predicated acts. Id.

Scott alleges that Wayne F. Henley, a fellow Mechanical Foreman, used racial epitaphs while threatening Scott's life on more than one occasion. At the January 27, 1996, hearing Scott testified that Clemmer threatened that if he caught Scott at the Coal Pier at night, "he was going to kick his black ass," or words to that effect. Scott also alleges that Jerry W. Clemmer, another Mechanical Foreman, repeatedly told Scott that he was an "incompetent black engineer." Finally, Scott maintains that his supervisors, Goode, Tobias, Manetta, Heilig and Hale targeted his projects for special scrutiny and criticism because of his race.

In order to establish that NS had knowledge of these acts, Scott must demonstrate that he complained to NS or that the harassment was so pervasive that the employer's awareness may be inferred. Swintek v. US Air, Inc., 830 F.2d 552, 558 (4th Cir. 1987). Scott stated at his deposition that he made complaints concerning racial harassment to Jeff Pair, Scott's direct supervisor at the Coal Piers. (Scott Dep. at 92.)

Scott's other allegations of harassment consisting largely of claims of increased workload and supervisor scrutiny of his work assignments. Scott directs the Court's attention to a work schedule for NS's employees at the Coal Pier. (Pl.'s Ex. 12.) The schedule indicates that 35 projects were assigned to Scott, but only 22 projects were assigned to Clemmer, the other Mechanical Foreman. (Id.) Scott states that the increased workload and supervision coincided with his complaints of harassment to Jeff Pair. The Court cannot say at this time that Scott has failed to present a genuine

issue of material facts as to his claim of racial harassment. Accordingly, NS's motion for summary judgment as to Scott's racial harassment claim is **DENIED.**

Scott has also alleges that his discharge was racially motivated.[2] According to NS, Scott was terminated for "conduct unbecoming a supervisory employee in connection with an injury which he allegedly sustained on February 8, 1996." (Heilig Aff. ¶ 12.) Specifically, NS maintains that Scott filed a untimely and potentially false report of an injury received on February 8, 1996.

Scott alleges that he was injured in a slip-and-fall around 5:00 p.m. on February 8, 1996. Scott states that he did not realize that he was injured until 1:00 a.m. on February 9, 1996. Scott alleges that he reported this injury to Pair by a letter he dropped into Pair's mailbox around 8:00 a.m. on February 9, 1996. (Scott Aff. ¶ 17) Scott also alleges that he told Pair he was going home around 4:00 p.m. on February 9, 1996, because of back pain and headaches, but did not discuss the slip-and-fall at that time. (Id.)

NS points to the affidavit of Timothy A. Heilig, NS's Director of Mechanical Maintenance, in which he states that Pair did not receive Scott's written injury report until Monday, February 12,

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[2] In Scott's brief in opposition to the defendant's motion for summary judgment, and at the January 28, 1997, hearing, Scott also argued that his termination was in retaliation for filing charges with the EEOC and related lawsuits, and that his transfer was racially motivated. This Court has granted Scott numerous opportunities to amend his complaint. Nevertheless, Scott has never made such allegations in any of his amended complaints. Accordingly, the Court will not allow him to advance these new theories at this late stage of the proceedings.

1996. Heilig thus considered the report to be untimely. (Heilig Aff. ¶ 22.) Heilig began an investigation of the injury which revealed that no one saw Scott fall or saw any indications that he was injured on February 8 or 9, 1996. (Id. ¶ 19.)

NS's safety rules require that an employee injured at work must report the injury to his supervisor before leaving the premises. (Pl.'s Ex. 9.) However, Scott has alleged that he did not know he was injured until early in the morning of February 9, 1996.

While NS has proffered a legitimate reason for the termination, the facts presented by Scott create a genuine dispute as to the reasons for NS's termination of Scott. In cases such as this, where the motive and credibility of the witnesses is at issue, summary judgment is seldom appropriate. See Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Accordingly, NS's motion for summary judgment as to Scott's Title VII claim of racially motivated discharge is **DENIED.**

**c. Retaliatory Transfer.**

To establish a prima facie case of retaliation Scott must prove: (1) he engaged in protected activity; (2) NS took adverse employment action against him; and (3) a causal connection existed between the protected activity and the adverse action. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985). If Scott establishes a prima facie case, the employer may offer legitimate reasons for its action. Scott however, has the ultimate burden of proving that the employer's reasons are pretextual. Egbuna v. Time-Life Libraries, Inc., 95 F.3d 353, 355 (4th Cir. 1996).

Scott's 1995 and 1996 EEOC charges and Scott I, the lawsuit based upon the allegations in his 1995 EEOC charge, are protected activities. Three weeks after the conclusion of the trial in Scott I, NS offered Scott $70,000 to resign and release any legal claims. Scott

rejected NS's offer. Scott did not wish to be transferred and he had made his wishes known to his employer on two job performance appraisal forms. (Scott Aff. ¶ 64) (Pl.'s Ex. 6, 7.) Nevertheless, on January 10, 1996, NS initiated the paperwork necessary to transfer Scott to Decatur, Illinois effective February 16, 1996. (Pl.'s Ex. 14.) In fact, Scott was never transferred because he was terminated on February 16, 1996.

NS maintains that this transfer was neither retaliatory, nor was it an adverse employment action. While Scott's salary and responsibilities may not have suffered may not have suffered as a result of his transfer, Title VII does not limit adverse job action to loss of pay or responsibility. See Collins v. State of Illinois, 830 F.2d 692 (7th Cir. 1987) (citations omitted). Scott had indicated to his employer that he did not wish to be transferred. The crucial issue in this claim is the motivation behind NS's decision to transfer Scott. "Summary Judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of a claim or defense. Charbonnages de France, 597 F.2d at 414 (citation omitted). Provided that the transfer was an adverse employment action, the close proximity in time between the conclusion of the trial in Scott I, Scott's refusal to resign, and NS and NS's decision to transfer him are sufficient to establish a genuine dispute as to NS's motivation for the proposed transfer. See Collins, 830 F.2d at 705; DeCintio v. Westchester County Medical Center, 821 F.2d 111 (2nd Cir. 1987), cert. denied, 484 U.S. 965 (1987). Accordingly, NS's motion for summary judgment as to Scott's Title VII claim for retaliatory transfer is **DENIED.**

**Count 2: FELA Personal Injury Claim.**

Scott alleges that he sustained back and shoulder injuries as a result of a slip-and-fall at Portlock Yard on February 8, 1996. To state a claim under the FELA, Scott must include all the elements of a common law negligence action. Brown v. CSX Transp., Inc., 18 F.3d 245 (4th Cir. 1994). The issue is one for the jury if Scott

establishes that his employer's "negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Id. at 248 (citing Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506 (1957)). The employee's contributory negligence is not bar to recovery; damages are simply reduced in proportion to the employee's negligence. Caillouette v. Baltimore & Ohio Chicago Terminal R.R. Co., 705 F.2d 243, 246 (7th Cir. 1983). Scott has the burden of showing that with the exercise of due care NS could have prevented the slip-and-fall.

On February 8, 1996, Scott and Cramer were at the NS intermodal ramp in Chesapeake, Virginia inspecting fuel storage tanks. According to Scott, Cramer went to his car to get a camera and was not present at the time of Scott's fall. Scott observed water leaking out of a small hole in the side of a containment dike. Scott noted a sheen on top of the resulting puddle, and now believes that this sheen was diesel fuel floating on tip of the water puddle. As Scott approached the containment dike to inspect the leak, he alleges that he slipped on a small bolt lying in the puddle and fell.

Because of icy conditions, Henley had instructed all Mechanical Department personnel, including Scott, to wear "Ice Creepers" (rubber slip-on spikes worn over shoes) when working outside to guard against slipping on the ice. Ice Creepers contain a manufacturer's warning indicating that they are not intended for "walking on concrete, cement, or other hard paved surfaces" and that so doing may increase you risk of injury. (Pl.'s Ex. 15.) Scott states in his affidavit that Clemmer's issued his instruction to wear Ice Creepers during a morning safety meeting. At this meeting Scott maintains that union employees discussed the product's warning and their concerns about wearing the Ice Creepers on ice-free surfaces. Nevertheless, Scott alleges that NS required him to wear Ice Creepers on paved ice-free surfaces, despite the product's warning, and that this negligently contributed to his accident.

In a memorandum prepared by Pair as part of his investigation of Scott's accident, he stated that when he inspected the area on February 12, 1996, "[t]he area possessed debris, trash, and uncoiled hoses." (Pl.'s Ex. 16.) Scott argues that NS should have been aware of the presence of the trash and debris prior to his accident because NS is required to make visual inspections of these aboveground tanks on a daily basis. (Pl.'s Ex. 37 at 12.) Scott states that it appeared that the debris had been in the area for a long time. Scott maintains that the combination of the Ice Creepers, the bolt, and the diesel fuel/water mixture caused him to slip and fall. Scott has presented evidence sufficient to create a genuine dispute as to whether NS's negligence contributed to Scott's injury. Therefore, NS's motion for summary judgment as to Scott's claim for personal injury under the FELA is **DENIED.**

**Count 3; Assault and battery.**

Scott alleges assault and battery by NS police agents. Scott alleges that NS police agents conducted surveillance of him at his home and followed him around town. NS operates a Police Department with a Special Investigative Unit ("SIU"). (Hanes Aff. ¶ 2.) On February 14 and 15, 1996 a G.L. Hedgepath and a W.D. Catron, agents of the SIU, conducted surveillance of Scott as part of an investigation into what NS believed was a fraudulent injury claim. (Id.) Scott alleges that he approached the surveillance Van to write down its license plate numbers. While examining the taillight for a vehicle year identification, Scott alleges that Catron physically shoved him backwards warning, "don't get to close to his damn van [sic]. I'll kick your black ass [sic]." (T. 355) Scott maintains that his back injury was exacerbated when Catron pushed him.

In order for Scott to recover for his claim of assault and battery alleged in Count 3 he must establish that NS is vicariously liable for the predicate acts of its employees. In Virginia, an act is with the scope of employment if:

> (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, and did not arise from some external, independent, and personal motive on the part of the [employee] to d the act upon his own account. When an employer-employee relationship has been established, the burden is on the employer to prove that the employee was not acting within the scope of employment when he committed the act complained of, and if the evidence leave the question in doubt it becomes an issue to be determined by the jury.

Kensington Assoc. v. West, 234 Va. 430, 432-433 (1987) (internal quotations and citations omitted).

Scott does not argue that Catron was authorized to assault him, rather Scott maintains that Catron's conduct, while ill-advised, was intended in part to further his employer's purpose.

> "Anger, malice, vindictiveness, - frailties of human nature, - are among the risks imposed upon the master in the employment of his servants. When these emotions are indulged by the servant, even to the extent of committing a wilful tort, if the ultimate purpose to be thereby attained is in furtherance of the servant's duties entrusted to him, the master is liable for the resultant damage."

Tri-State Coach Corp. v. Walsh, 188 Va. 299, 305 (1948). Whether Catron was motivated to further NS's interests, or from some impulse which grew naturally from his attempt to perform NS's business, will turn on the credibility of the witnesses and the intent of the actors. Therefore, NS's motion for summary judgment is **DENIED** as to Scott's claim for assault and battery.

**Count 4; Virginia Wrongful Discharge.**

The defendant maintains that Scott's claim for wrongful discharge under Virginia common law fails to state a claim upon which relief can be granted. Virginia recognizes a cause of action for wrongful discharge in violation of the Commonwealth's public policy as embodied in statutes. In Lockhart v. Commonwealth Educ. Systems Corp., 247 Va. 98 (1994), the Virginia Supreme Court recognized that the Virginia Human Rights Act enunciates the Commonwealth's public policy against race and gender discrimination in employment. The Court has recently reaffirmed the principle expressed in Lockhart, that a cause of action for wrongful discharge based on race or gender discrimination arises not from the Virginia Human Rights Act itself, but from the Act's statutory embodiment of the public policy of the Commonwealth. Bailey v. Scott-Gallaher Inc., -- Va. --, 1997 WL 15271 *1, *2-*4 (Va., Jan. 10, 1997). Therefore, defendant's motion to dismiss Scott's common law wrongful discharge claim is **DENIED.**

**Counts 5 and 6; Intentional and Negligent Infliction of Emotional Distress under FELA.**

Under FELA, the "zone of danger test" is applied to determine whether an emotional injury is cognizable. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994). Under this test, an emotional injury claim is cognizable only if the plaintiff sustains a physical impact or is placed at risk of imminent physical harm because of the defendant. Id. at 545.

To the extent that Scott relies upon the facts alleged in his assault and battery claim in Count Three (3), the alleged assault and battery occurred outside the scope of Scott's employment and therefore is not actionable under the FELA. Any claim for intentional or negligent infliction of emotional distress based upon the same set of facts are subsumed by Count Three (3).

Scott alleges that he has sustained a stress related physical impact in the form of "hemorrhoids and stool bleeding." (Scott Aff. ¶ 73, Pl.'s Ex. 39.) Scott alleges that his hemorrhoids are a direct and proximate result of NS negligence. However, Scott has not produced any evidence that his hemorrhoids have been caused by the actions of NS. Scott has produced only a medical report indicating that Scott complained of hemorrhoids to his doctor. (Pl's Ex. 37.) Nothing in the medical report indicated that the doctor even verified Scott's diagnosis of hemorrhoids, much less express an opinion that Scott's hemorrhoids were related to the actions of Scott's employer.

Therefore, the Court **GRANTS** the defendant's motion for summary judgment as to Counts 5 and 6.

**Counts 7 and 8; Intentional and Negligent Infliction of Emotional Distress under Virginia Common Law.**

Scott is entitled to seek damages for emotional distress resulting from the alleged assault and battery in Count Three (3). To the extent that he seeks to advance a separate claim for intentional infliction of emotional distress based upon his other allegations of racial harassment, Virginia requires that: (1) the conduct must be intentional or reckless; (2) the conduct must be outrageous and intolerable in that it offends generally accepted standards of decency and morality; (3) a causal connection must exist between the wrongful conduct and the emotional distress; and (4) the emotional distress suffered must be severe. Womack v. Eldridge, 215 Va. 338 (1974).

None of the other alleged acts attributable to NS rise to the level outrageousness and intolerableness required to state a claim for intentional infliction of emotional distress.

In order to establish a claim for negligent infliction of emotional distress, Scott must demonstrate some physical injury as a direct

and proximate result of the defendants negligence. Myseros v. Sissler, 239 Va. 27 (1973). As previously stated, Scott has presented no evidence that his hemorrhoids have been caused by the actions of NS. Scott has produced only a medical report indicating that Scott complained of hemorrhoids to his doctor. (Pl.'s Ex. 37.)

Accordingly, NS motion for summary judgment as to Counts 7 and 8 are **GRANTED** and the claims are **DISMISSED.**

**III. Conclusion.**

The defendant's motion for summary judgment as to Scott's Title VII equal compensation and promotion claims in Count One (1), and Counts Five (5), Six (6), Seven (7), and Eight (8) is **GRANTED** and the Court hereby **DISMISSES** these claims. As to all other counts, the defendants motion for summary judgment is DENIED. Additionally, defendant's motion to dismiss Count Four (4) is **DENIED.**

The Clerk is **REQUESTED** to send a copy of this Order to plaintiff and counsel for defendant.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.

HENRY COKE MORGAN, JR
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
February 5, 1997

# APPENDIX E
# PETITIONER'S CHARGE OF DISCRIMINATION FILED WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**CHARGE OF DISCRIMINATION**

AGENCY EEOC
CHARGE NUMBER 121960256

Virginia Council On Human Rights and EEOC

Mr. Michael A. Scott (804) 495-0844
4753 Longmont Road, Virginia Beach, VA 23456-5017 11/14/61

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME

RESPONDENT
Norfolk Southern Corporation Cat D (501+) (804) 629-2600
Three Commercial Place, Norfolk, VA 23514 County 710

CAUSE OF DISCRIMINATION BASED ON
RACE, RETALIATION

THE PARTICULARS ARE

1. I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

2. A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which stated I had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.

3. I believe I was harassed, transferred, and discharged because of my race, Black, and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights Act of 1964, as amended.

4. Blacks and other minorities have been excluded from the positions of Master Mechanic and all mechanical positions above Master Mechanic, Assistant Division Engineer and all positions above Assistant Division Engineer, Superintendent and all positions above Superintendent, and General Supervisor Communications and Signals and all positions above General Supervisor Communications and Signals.

I declare under penalty of perjury that the foregoing is true and correct.

March 6, 1996 /s/ Michael A. Scott

# APPENDIX F
# PETITIONER'S AFFIDAVIT FILED WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STATE OF VIRGINIA CASE NAME Scott vs. Norfolk Sou
CITY/COUNTY OF Virginia Beach/Virginia Beach
CASE NUMBER 121960256

**AFFIDAVIT**

I, Michael A. Scott being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 34 years of age, my gender is Male and my racial identity is Black. I reside at 4753 Longmont Road, City of Virginia Beach, County of Virginia Beach, State of Virginia, Zip Code 23456-5017. My telephone number is (804) 495-0844.

My statement concerns Norfolk Southern Corporation which is located at Three Commercial Place, in Norfolk, Virginia 23514.

My job classification is Mechanical Foreman.

My immediate supervisor is J. E. Pair, Engineer Pier Facilities.

I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in

Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which stated I had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.

A. L. Luttrell told me I was to report to Decatur, Illinois. I felt the transfer was retaliatory as was the job abolishment. J. Scott, a Black, had his job abolished and he was transferred. I do not recall when this occurred.

I was discharged on February 16, 1996 after I was injured by slipping in some diesel fuel. I do not know why my injury was considered misconduct, because it was an accident. I had an injury in 1992 which was not considered misconduct. I do not know why the Respondent is taking this position other than to think it retaliation. R. L. Mago, Filapano; C. D. McGraw and G. N. Doss, both White, had injuries on the job, and they were not discharged.

Last summer, W. F. Henley, a White General Foreman, made threats of violence/bodily harm and death against me because I filed the charge. He was one of the persons I accused concerning sexual harassment. Roger D. Lafon, a White Foreman, witnessed the threat. Henley did not make threats to any other employee to my knowledge.

J. R. Gray, a White Assistant Master Mechanic; D. D. Graab, a White Master Mechanic; J. W. Clemmer, a White General Foreman; and J. E. Pair, a White Engineer harassed me by making accusations that I was not participating with other supervisors, not being a team player with other White supervisors, and not regularly attending safety meetings. I do not have a witness to name for this allegation, because I feel no one will be truthful.

J. W. Clemmer stated I was an incompetent Black Engineer. There was no witness.

I was given more and bigger projects than J. E. Pair, J. A. Scott and J. W. Clemmer to be completed in the same length of time. J. R. Gray gave these assignments through J. E. Pair.

I was followed by private investigators hired by the Respondent. I was able to obtain the evidence to establish I was being followed. I was discharged after I took a letter to J. R. Gray which complained about being followed by the private investigators.

Respondent excludes Blacks and other minorities from the position of Master Mechanic and all mechanical positions above Master Mechanic, Assistant Division Engineer and all positions above Assistant Division Engineer, Superintendent and all positions above Superintendent, and General Supervisor Communications and Signals and all positions above General Supervisor Communications and Signals. Promotions to these positions are done subjectively by recommendation from White male managers. There is no bid system for promotion.

I believe I was harassed, transferred, and discharged because of my race, Black and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights of 1964, as amended.

I have read and had an opportunity to correct this Affidavit consisting of 3 typed pages and swear that these facts are true and correct to the best of my knowledge and belief.

/s/ Michael A. Scott

Subscribed and sworn to before me
this 6th day of March 1996.
/s/ Ernestine C. Thomas